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NO.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1980

JOSEPH W. SMITH, JR.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a legal question has arisen, and not yet answered, out of universal concern over the character of the law - - an income tax - - and the questionable subject upon which it legislates currently; that is, an admittedly uncontrollable income redistribution scheme, of which the excessive exaction therefrom questions the enumerated powers of the Federal Government, this seeming exercise of the taxing authority being so arbitrary, and so wanting for classification, as to question whether the exaction is not simply a confiscation of property under the guise of tax.

2. Whether the Court below neglected its judicial function in summarily affirming the United States Tax Court's decision, having disregarded the questions put to it in a manner in conflict with applicable decissions of this Court; and departing so far

from the accepted and usual course of judicial proceeding when two parties are in equity before the law; and having so far sanctioned the departure by three lower courts - - their erroneous decisions pursuant to 26 U.S.C. 7421 and 28 U.S.C. 1346, and pursuant to State v. Rossi 43 A 2d 323, 71 RI 284; (See Reasons for Granting Writ) and regarding respondent's conspiracy to defraud petitioner, pursuant to the provisions of: 26 U.S.C. sections 6213, 7605(b), 6402(a), 6512(a) of the Internal Revenue Code of 1954 - - as to call for an exercise of this Court's power of supervision.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, JOSEPH W. SMITH, JR., prays that a writ of certiorari issue to review the opinion and judgment of the Court of Appeals for the Ninth Circuit rendered in these proceedings on December 23, 1980.

OPINIONS BELOW

The opinion of the Court of Appeals appears at Appendix 31-34. The opinion of the United States Tax Court appears at Appendix 1-9. The opinion of the United States Tax Court, on a Motion to Dismiss, appears at Appendix 10-14. The opinions of the United States District Courts for the Southern District of Florida and the District of Oregon appears at Appendix 17-30.

JURISDICTION

The "Memorandum" of the United States Court of Appeals for the Ninth Circuit was entered on December 23, 1980, appearing at Appendix 31-34. This petition for certiorari was filed less than 90 days from the date aforesaid. The jurisdiction of this Court is invoked under 26 U.S.C. sections 6213 and 7421; and 28 U.S.C. section 1346.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States -

Amendment V:

" . . . nor be deprived of life, liberty,

or property, without due process of law . . ."

Amendment IX:

"The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

Article I, section 8:

"The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

Article III, section 2:

"The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, . . . to controversies to which the United States shall be a party; . . ."

THE STATUTES INVOLVED

26 U.S.C. section 6213 (App.46)

26 U.S.C. section 6402 (App.60)

26 U.S.C. section 6512(a) (App. 60-61)

26 U.S.C. section 7421

> "Except as provided in sections 6212(a) and (c), and 6213(a), no suit for the for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." This requirement does not apply to assessments under Subtitle C of the Code; that section of 7421 bars all actions to restrain collection excpet 'where (a) the tax assessment is an illegal exaction in the guise of a tax and (b) there are present 'special and extraordinary circumstances sufficient to bring the case within some acknowledged head of equity jurisprudence'. Miller v. Standard Nut Margarine Co of Florida 1932, 284 U.S. 498, 509, 52 S.Ct. 260, 263, 76 L.Ed. 422"; Botta v. Scanlon 288 F 2d 504,505 (1961); National Foundry Co. of N.Y. v. Director of Internal Revenue 229 F 2d 149 (1956) (App. 56-57)

26 U.S.C. section 7605(b) (App.61)

28 U.S.C. section 1346 - U.S. as Defendant:

> (a) The district courts shall have original jurisdiction . . . of:
> (1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected . . . or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws.

STATEMENT OF THE CASE

Basis for Review:

Petitioner's Tax Court petition complained of a redistribution of income to such an extreme extent that the exaction imposed on petitioner was:

> "taking away my personal liberty in that the amount of income tax I am asked to pay, not income tax per se, is depriving me of essential needs."
>
> "Under the seeming exercise of the taxing power, the taxing statute is so arbitrary as to compel the conclusion that it was not the exertion of taxation, but the confiscation of property, or is so wanting in basis for classification as to produce such a gross and patent inequity as inevitably to lead to the same conclusion." Brushaber v. Union Pacific R.R. 240 U.S. 1, 24-25 (1916)

Congress has provided a procedure by which an aggrieved taxpayer may challenge the legality of a tax. He may decline to pay and have a determination made in the United States Tax Court. 26 U.S.C., section 6213. Being as there are no further specifics, this was the authority petitioner used to get his case before a federal court.

Petitioner declined to pay twenty percent of his 1973 tax. He took deductions from his 1974 tax return not ordinarily allowable, excepting that a "higher law" supercedes in petitioner's case. Petitioner did not pay his self-employment tax for the above reason when he filed his 1974 tax return. This left petitioner with no tax to pay in 1974.

Petitioner strictly conformed to IRS rules by filling in all parts of his two returns being questioned, reporting his income accurately and correctly.

Respondent, at the time, did not agree with petitioner as to his right to withold payment of taxes. (letter from the Direc- of Internal Revenue, App.37)

Explanatory schedules petitioner attached to each of his two tax returns, claiming that the deductions were peti-

tioner's way of challenging the tax on constitutional grounds were of no consequence, as far as respondent was concerned.

However, pursuant to regulations, respondent is required to, and did issue a Notice of Deficiency for 1973 taxes on August 20, 1976. The notice had tacked onto it a negligence penalty.

A fact never fully explained by respondent: petitioner's 1974 tax return, being questioned on constitutional grounds - - the same as in 1973 - - was handled differently. Respondent sent petitioner an assessment for the tax, later admitted as being an "improper assessment". It was erroneous (1) as to its mathematical computations, and (2) as to its caption. (Joseph W. and Doris M. Smith, Jr.) Said assessment claimed a "correction to arithmetic" - - this a fraud. Section 6213(b) of the I.R.C. of 1954 provides that on mathematical errors the assessment serves

as a Notice of Deficiency. (for respondent's detailed explanation, see transcript, App.11-13)

Because of an IRS audit of petitioner's 1974 taxes, respondent was obliged to issue a Notice of Deficiency on Aug. 20, 1976, along with the 1973 Notice, to accommodate an addition to tax not already assessed. The Notice contained a negligence penalty.

Petitioner filed timely petitions for both tax years in the United States Tax Court on October 28, 1976, this a provision allowed when a Notice of Deficiency is issued. In response to the 1974 tax assessment, (the fraud) petitioner filed a Motion to Dismiss respondent's case for 1974 on October 20, 1977.

The Tax Court, in a hearing on the Motion on November 23, 1977, while taking note that the assessment was erroneous,

did not dismiss the case. (See transcript App. 14) Consequently, at the Tax Court trial on June 19, 1978, respondent amended what he termed an "improper assessment", partially abating it under the pretext: "To allow petitioner to argue the merits of a credit claimed against tax as a protest against the taxing and spending policies of the United States Government." (Actually, the assessment was abated only in the part which was an erroneous miscalculation by respondent and a small income tax, but not as to a large self-employment tax.)

The Tax Court received the respondent's amended assessment as filed. On petitioner's question as to the assessment being void, the Court's contention: "It may be too high, it may be too low, . . . but it's not void." The Court: "The so-called 'mathematical error' (the fraud) is not subject to appeal in this Court, but if it's not a mathematical error, you (petitioner) can go ahead and

challenge the right to make the assessment in the District Court." (See transcript, App.6-7)

In reference to respondent's continual shifting of the amount of tax petitioner owed, even during the trial, (because of the fraud) the Tax Court waved the 1974 negligence penalty, noting: "I think that somebody's been negligent on the other side here, too." (transcript App. 7)

In reference to respondent's negligence, (fraudulence) the United States Court of Appeals, in its memorandum noted: "Corrected miscalculations by our creditors are annoyances, but not legally cognizable injuries normally." And, with reference to the assessment, the Court: "Smith owed the tax and does not show that any mathematical error exists. (Apparent meaning that no fraud exists.) No right of Smith has been violated."

Respondent's alleged total tax liability varied, but is was around $2,600 for the tax years of 1973 and 1974 combined. By crediting and/or "freezing" petitioner's overpayment of taxes for 1975 and two refunds due, one for 1975 and the other for 1976, these refunds due to net operating losses, respondent held in excess of $6,300 of petitioner's property, refusing to pay. (App. 35-36)

Petitioner filed for the two net operating loss refunds in April of 1977. The refund applicable to a 1976 net operating loss, carried back to 1973, causing a tax refund of $1,695.50, was credited to petitioner's alleged tax liabilities. The 1975 net operating loss, carried back to 1972, causing a tax refund of $4,591, was "Frozen".

On April 6, 1979, a Treasury check for $5,592.09 was made out to Joseph W. Smith, Jr.

and mailed to petitioner. Since there was no explanation ever given, petitioner logically assumed the check was to cover the "frozen" 1975 tax refund, plus interest.

On April 13, 1979, a Treasury check was made out to Joseph W., Jr. and Doris M. Smith for $929.04 and mailed to petitioner. No explanation was given. Petitioner can only assume this check was to cover IRS errors, all because of an IRS conspiracy to defraud petitioner, which left a trail of inextricable bookkeeping problems from May of 1975 until the mailing of the check.

The United States District Courts Sanctions

"A" The "So-called Mathematical Error":

Pursuant to 28 U.S.C. Section 1346, petitioner filed suits in two U.S. District Courts. (App. 17-30) This code section provides, as follows:

> "any civil action against the United states for the recovery of any internal-revenue tax alleged to have been erroniously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws . . ."

shall be within the original jurisdiction of the United States District Court.

"B" 26 U.S.C. Sections 6402(a) and 6512(a) Indiscretions

These sections of the Code of 1954 were the authority presented to the Court for crediting the overpayment of taxes and the refund. Section 6402(a) provides, as a general rule, in the case of overpayment of taxes, respondent may credit the amount of such overpayment against any liability of taxes then due. Section 6512(a) provides that no credit or refund of income tax for the same taxable year shall be allowed or made and no suit by the taxpayer for the recovery of any part of the tax shall be instituted in any court when a petition has been entered in the Tax Court.

The overpayment was for 1975, not a tax year in litigation. The refunds were for 1975 and 1976, tax years not in litigation before the Tax Court.

Both of the complaints before the district Courts were dismissed because petitioner's case was already before the Tax Court. (See Yannicelli v. Nash 354 F Supp 143 (1973) and Botta v. Scanlon, 288 F 2d 504, 506 (1961) (App. 54-57)

Petitioner's two suits generally followed the following provisions of section 1346:

> "In action to restrain collection of federal taxes, where complaint alleged that the taxes could not be legally assessed against plaintiff and that property rights of plaintiff would be utterly destroyed if compelled to pay and that a suit to recover the taxes would not provide adequate remedy, complaint was not subject to motion to dismiss . . ."

Due to the erroneous District Court dismissals, at the Tax Court hearing on June 19, 1978, that Court allowed a credited

refund for the 1975 tax overpayment to be a consideration in its finding. Also, a 1975 net operating carryback loss refund credited to the 1974 tax liability was made part of the consideration in its findings. But the net operating carryback loss refund "frozen", or the same as credited for two years, an amount in excess of $4,500, was not allowed as a consideration. (App.8-9)

A notice of appeal to the Court of Appeals was timely filed on December 11, 1978. The Tax Court's decision was affirmed on December 23, 1980. (App.31-34)

Improper Tax Lien:

Pursuant to the Tax Court decision, petitioner received a tax bill on June 11, 1979 for $1,855.89 on 1973 taxes. At the same time, petitioner received a tax bill for unpaid 1974 taxes of $831.34.

Petitioner made several attempts to have the extraordinary assessment clarified.

No explanation was ever offered. Then a revenue agent, as before, started demanding payment of the erroneous assessments, as far as anyone could possibly know. Obviously, petitioner would do no more than refuse to pay a tax bill he thought to be in error.

Nothing further took place until petitioner sold his residence in September 1980. When petitioner went to the title company to pick up the proceeds from the sale, he found to his surprise a deduction of $2,566.54 to satisfy a United States tax lien. (App.62-63)

Petitioner filed a claim for refund on November 9, 1980. There has been no further word from the respondent since that filing.

REASONS FOR GRANTING THE WRIT

Urgent Need for Review:

When the ends of the law: a higher law in existence even before governments, a law having higher attributes than current fiscal policies, a law that has not been recognized, defined, nor attained in recent years; that is, when there has been no limit or legally prohibiting edict made to excesses in taxing and spending; and, when there has been no endeavor to secure those interests that are within a still undefined limit - - and to which this case addresses itself - - it would seem to be time enough to be heard in this Court.

The urgency lies in the fact that there has been a progressively growing shift in emphasis away from property rights, and to their almost complete replacement, other personal rights as the primary focus of the law's concern.

An argument based on the proposition that power to tax and spend includes power to discharge a moral obligation may be conceded, and has been declared legal by this Court. But an argument that Congress may therefore create a scheme, which itself causes prohibited deprivations of rights to the people - - under the pretext of doing what it considers its honorable duty - - which scheme may then tax unlimitedly to meet those "moral obligations" - - would appear by any reasonable standard of values simply a juggling of honor with chicanery. An abuse of the trust the people placed in the Federal Government fits better than honorable duty.

As experience has taught us, and as court sanctioned social programs have demonstrated, taxpayers property has become a means to a transfer of personal rights, the end result of which has ceased to make any sense or justice.

This case has been an example of the difficulty of making a determination of the issues contained herein. Today society and the individual are competing, and the lower courts virtually decide the question in advance, however valid the question may be, when property right is up against competing social interests.

Petitioner prays, due to these circumstances, that recognition be given to the problem and the danger existing to our heritage as free men being eroded away by reckless congressional taxing and spending policies; and connected inexorably and irreconcilably, tyrannical tax collection measures meant to discourage any resistence against confiscatory policies, which might otherwise be the case.

To find the remedy, we must look to our founding fathers, who, with the realization that the real enemy of democracy is

is a monopoly of political power, provided a balance in the Constitution - - a public sector strong enough to check abuses in the private sector, and a private sector strong enough to check abuses in the public sector.

The "New Deal", with all its good intentions, motivated this Court to redetermine the rightful role of the Federal Government. This is not to say that the change was not needed, but it was the beginning of the problems we are faced with today. "While it isn't written in the Constitution", declared FDR in 1933, "nevertheless, it is the inherent duty of the Federal Government to keep its citizens from starvation." In 1937, FDR said: "The balance of power between the three great branches of the Federal Government, has been tipped out of balance by the Courts in direct contradiction of the high purposes of the framers of the Constitution. We have reached the

point", he declared, "where we must take action to save the Constitution from the Court." No doubt true, in light of the needs of that day, but from the ensuing spate of social spending, and the resulting demise, it appears somewhat ironic that Justice Brandeis and some of his brothers would reason: "property is only a means. It has been a frequent error of our court that they have made the means an end."

While FDR's "New Deal" might be compared to a concerned physician administering a narcotic for acute pain, as distinguished, present day "dope pushers" and "prostitutes" under the guise of tax to perform an honorable duty, are praying on human weakness.

Property Rights, A Higher Law in Question:

This Court's test as to a right is whether the right at issue is "of the very essence of a scheme of ordered liberty", by reason that neither liberty nor justice would exist if such a right were sacrificed.

Whereas, it is legal to tax unequally to defray government expenses, the legality begins to crumble, and is distinguishable, when applying the mathematics to unequal taxation to transfer 75% of the tax collected to other citizens. When the element of redistribution of the nation's income is introduced to this extent, and the exaction causes a deprivation of rights to the taxpayer, an unanswered, heretofore non-existent constitutional question arises, which has no relation to any wisdom or economic theory put into place by our lawmakers.

"A tax to promote the general welfare cannot be rested out of its setting and legalized by ignoring its purpose as the mere instrumentality for bringing about a desired end." U.S. v. Butler, 297 U.S. 1,61 (1936)

Law is reason codified by experience;

and the experience of property rights, having been substantially adversely affected, is proving conclusively today to be a very bad experience for the nation.

Cooley's Constitutional Limitations identified due process with the doctrine of vested rights drawn from natural law. Thus, where under the natural law, petitioner prays, is there a standard for free men set by taking from petitioner in such excess that, after paying the exaction forced upon him, he is unable to provide for his own basic needs; and, by handing over the fruits of his labor, others are provided with the same as petitioner's basic needs?

Justice Douglas maintained that the Ninth Amendment is as a moon partially eclipsed by other parts of the Constitution. His "penumbra theory" has won assent of the majority of this Court. Specific guarantees

in the Bill of Rights have penumbras, said Justice Douglas. "Various guarantees create zones of privacy." Griswald v. Conn., 381 U.S. 479, 484, 485 (1965)

And this Court holds: "it is elementary that tax laws are to be interpreted liberally in favor of taxpayers and the words defining things to be taxed may not be extended beyond their clear import . . . And this Court likewise recognized the rule that, in cases where complainant shows that in addition to the illegality of an exaction in the guise of a tax there exist special and extraordinary circumstances sufficient to bring the case within some acknowledged head of equity jurisprudence, a suit may be maintained to enjoin the collector." Miller v. Nut Margarine Co., 284 U.S. 498,508, 509 (1932)

We should not accept the explanation that we are at issue over simply an elucidation of grants in aid, but must regard the present redistribution of income as a tacit declaration of a new purpose; not an explanation of an old one. To quote this Court in Swab v. Doyle, 258 U.S., 529 (1922): "It is to be remembered that we are dealing with a tax measure and whatever doubts exist must be resolved against it."

What we actually are dealing with here is a revisionist scheme gone awry, an unconstitutional explosion of taxing and spending, which has all but consumed the very essence of our most basic fundamental law. Raw, uncontrolled political power is what we have.

By reason of man's lust for power, there has long been established a code of ethics incorporated into the law of the land which lays down principles on the use and abuse of all things, and this law judges the consti-

tutionality of our statutes. The society which refuses to recognize as legally cognizable this higher law is doomed to oblivion, a fact of history.

Abstract fair play is a fundamental part of the law. When an excess occurs, such as the one described herein, a higher law involved is deserving of answer. The law at stake is the cornerstone of our Republic. Petitioner hopes to preserve the law through this case.

These things petitioner brings to this Court's attention were well known by our founding fathers. John Adam's answer to the proposition that property is only a means to meet the needs of society: "The moment the idea is admitted into society that property is not as sacred as the laws of God . . anarchy and tyranny commence."

Life, liberty, and property are all equal in weight before the law. How can one today lay the three side by side and not see clearly an inequity of rights imposed against the property rights of taxpayers caused by capricious taxing and spending?

From the accepted doctrine that the United States is a government of delegated powers, it follows that those not expressly granted, or reasonably implied, are reserved to the States or the people. In the often referred to case of McCulloch v. Maryland, 4 Wheat. 316,421, a limitation was placed on Congress based on three theories of law to which this Court has remained loyal: (1) The Constitution is for the benefit of the people, not the government or the power structure; (2) it was intended to endure, consequently, to be flexible to the needs of society as they arise; and (3) with a limitation placed on the National

Government as one of enumerated powers and sovereign only to those powers, this confirmed in U.S. v. Butler 297 U.S. 1 (1936) App.51-54)

The Marshall Court construed our basic document to embrace "all means which are appropriate" to carry out "the legitimate ends" of the Constitution, unless forbidden by "the letter and the spirit of the Constitution".

"Higher law" holds that social spending firstly, not lastly, must be limited to a taxing and spending policy which is prudent to the rights of taxpayers. This is the only law which is a must in a free society.

To "save the Constitution", petitioner, in equity before the law, specifically charges that Congress, without authority of the people or this Court, has tipped the scales of justice far too much to the side of income transfers, and demonstrates no pro-

pensity to change its capricious ways, harvesting every tax year an ever increasing proportion of the nation's income.

The enormity of the offense against the grant of power the people left in trust to Congress gives those who suffer, to the point that their own economic existence is threatened, a personal stake in the outcome of a suit. It demonstrates clearly a connection of taxpayer status with the precise nature of the alleged constitutional infringement.

The agrieved party, therefore, may rightfully, if there is any fairness left, be heard in this Court on the grounds that his tax money is being extracted and spent in violation of specific constitutional protections against such abuses of power, this confirmed in Flast v. Cohen 392 U.S., 83 (1968). (App.47-51)

Subordinated Taxpayers, a Minority Interest:

The great principles established in the past generation applicable to "equal justice under the law" and "distributive justice" apply equally to taxpayers. Recognition should be given to taxpayers today as a minority interest.

A.Gary Shilling, an authoritative and often quoted economist, recently applying Department of Commerce figures, found that fifty-four percent of the population now depends on government spending for "a significant part of their income". This percentage figure, one can be sure, does not come close to reflecting the interests of benefactors of big government who lobby congressional representatives daily for a continuance of ever bigger income redistribution policies, which policies add to special interest incomes.

Petitioner, being a minority interest today, triggers an argument, which has heretofore not been the case. Petitioner is not arguing over "unwise" legislation which brings about high taxation. Congress is not limited in its wisdom to pass laws out of conscience and compassion. But an illegitimate metamorphosization of our fundamental law, which is the case in point - - on this Justice Jackson once declared:

> "The very purpose of the Bill of Rights was to withdraw certain subjects from the visissitudes of political controversy, to place them beyond the reach of majorities and officials and extablish them as legal principles to be applied by the courts. One's right to life, liberty, and property . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." West Va. State Board of Education v. Barnette, 319 U.S. 624, 638 (1943)

The problem, Justice Douglas once observed, is that we pat our backs far too much over the respect we show for individual liberties. The courts, in glowing terms,

compliment themselves; but, unless one has a militant civil-rights group to back him, the courts are too prone to plow the individual's case under, said Douglas.

Whereas, our founding fathers envisioned and put into place a system of government under which individual liberties reigned supreme, the original autonomous state of the individual has been subordinated in favor of group rights, out of which various single interest groups, having formed "iron triangles of power", divide and conquer the greater goals of the nation, and fundamental law along the way.

"Iron triangles" link executive bureaus, congressional committees and special interest groups, says Harvard Professor of Government, Hugh Heclo. Networks of people who regard each other as knowledgeable form public policy - - "though rarely in any controlled, well-organized way", he said. "The problems far outweigh the advantages."

Some of the Facts Demonstrating the Bad Faith of Congress:

Former Member of Congress, Martha W. Griffiths, (Dem.) of Michigan, a 20 year veteran of Congress and chairman of the Joint Senate-House Fiscal Policy Subcommitte, declared to the news media: "We have 10 legislative committees and 11 executive departments running entrenched social programs without anyone capable of seeing the overall picture." Said Mrs. Griffiths: "at the present time, (1974) middle-class persons are paying (through taxes) for better health care for the poor than they can afford for themseles. Legislators like myself, military men, etcetra, all have generous pension plans which cannot suffer default, due to federal guarantees. But the private citizen is still vulnerable. In America we virtually worship fairness, but too often we have not been fair to our most deserving citizens." She predicted

correctly in 1974 that: "nothing much will be done for them in the future, just as nothing much has been done in the past."

The needs for new social programs are constantly being drummed to the public, but they are not offered as replacements for older, less necessary programs. With every new crises, new demands are made on taxpayers, but Congress demands nothing of itself to balance taxing and spending with legitimate needs. And, why should Congress as long as people want things and politicians want to be re-elected?

Once on the books as law, each new program becomes an institution with its voting constituency. Needs change, but a benefactor constituency never changes. This is the very reason there are powers Congress does not have, and never should.

Former Attorney General Benjamin Civilette told a Senate Budget Committee: "Whenever

we look deeply with focused investigation, significant fraud and abuse will be detected."

There is a minority of citizens, of whom petitioner is one, who are great losers in the survival instincts of Congress' members. U.S. New & World Report statistics derived from Department of Commerce figures show that during the past 25 years retired federal workers have gained 125.4 percent in pay, and Social Security recipients, 79.9 percent. These and millions of others who pay little or no tax are indexed to inflation. The taxpayer is indexed also, the wrong way. As inflation goes up, so does the percentage he pays in tax. The net result is that inflation, which the Federal Government is behind, works to give the Federal Government powers it never had or should have.

The demands of organized labor, for them. has offset the harm of inflation. And organized labor consists of a huge

voting block. Looking at who composes the well entrenched power structure, those above mentioned voting constituencies, it is not difficult to see the exclusive federation, formed democratically, of course, but also leaving, as a result, a minority group, of which petitioner is a part, with a de facto deprivation of rights.

We are all-too-familiar with the euphemisms which extole our virtues; but what about those who are not compensated for high taxation and inflation - - the unorganized workers, the shopkeepers and other small businesses; what about those who don't fall into the category of old, sick, rich, poor, tax evaders, or organized - - those taxpayers who make up the backbone of America, asking for and receiving, as Martha Griffiths said, "nothing much".

Are we, the most deserving of all citizens not the victims of unscrupulous

taxation without representation? And, is it not we, who have had thrusted upon us this responsibility - - we who have the right under "due process" principles to have a meaningful hearing in a meaningful place - - to redefine the rightful role of respondent?

The Responsibility of the Judiciary:

It is fact that the Federal Budget is out of control with built in preferences. It is fact that seventy-five percent of the budget goes into an income transfer of which petitioner is not a part. Does this not even hint there is an ulterior motive to accomplish something that revenue words on their face do not say?

"It will be a sad day", said Justice Jackson when speaking of questionable revenue measures, "if the good will of the people toward their taxing system is fritered away in efforts to accomplish by taxation moral reforms that cannot be accom-

plished by direct legislation." U.S. v. Kahriger, 345 U.S. 22 (1953) (App.58-60)

If it is the basic law we are going to be concerned with here, and not a policy decision, true political and civil rights, being universally measurable, can make workable laws, which can be enforced with justice in our courts.

And some courts do recognize: "generally 'due process' or its equivalent, 'the law of the land' is not a guarantee that every court ruling shall be correct, but it is a guarantee that the fundamental principles of justice shall not be violated." State v. Rossi 43 A 2d 323, 71 RI 284.

The above assertion fits petitioner's case before the Court of Appeals. More than an error, the court denied "due process" in brushing petitioner's case aside. Using Brushaber as its excuse, the very case that petitioner used as his right to be

heard, is extraordinary neglect to its judicial function, in petitioner's view. (App.32-34)

In his opening remarks in the Statement of the Case, petitioner showed that in his petition to the Tax Court he quoted almost verbatim Chief Justice White's remarks as a reason for judicial review of the income tax law. Justice White, speaking for the Court in Brushaber, supra, 240 U.S. 1,36 S. Ct. 236, 60 L.E. 493, pointed out that, despite the breadth of the taxing power conferred by the Constitution, there might arise a case, such as petitioner's, where the tax is no more than a confiscation of property - - a taking under the guise of tax. Although this Court has never rejected this maxim, it has allowed an erosion of property rights to go on and on without a word one way or the other. Neither has the court below changed the course.

Petitioner will concede to the Court of Appeals as follows: "2. Smith

contends the Tax Court denied him a hearing on his due process claim. Smith is in error; the Tax Court heard him and rejected his claim." The Tax Court, in its own words, considered petitioner's claim "two minutes".

To quote the Court of Appeals "Memorandum" further: (App. 32-33)

"3. Smith insists that the Commissioner violated 26 U.S.C. Section 7605(b). There is no evidence to support this claim in the record and it does not appear to have been raised in the Tax Court."

From the Tax Court Transcript of June 19, 1978: (p. 15, lines 12-18)
MR. SMITH: "What I want to argue about in this Court is not that. (constitutional issue) What I want to argue about is the collection and - - the assessment and collection process and the illegal manner in which respondent has handled my tax. Now that - - (interrupted)

THE COURT: "I find nothing illegal in the respondent's handling of your tax . . ."
(p. 16, lines 3-10)
THE COURT: "I see you made a statement that she (petitioner's wife) gave them (IRS) information without your knowledge or consent, but that's neither here nor there."
MR. SMITH: "No, that's not the case, sir. That isn't the case at all. I have a right to be present at an audit of my return, is that not correct?"
THE COURT: "once they audited hers (the 1974 tax records) they didn't need to audit yours."
MR. SMITH: "You mean to tell me - - (interrupted)

It was upon this interruption that petitioner was about to relate, among other questionable acts of respondent, the re-examination of his 1973 return against his will and request. The facts of the re-

examination are explained in "IRS Conspiracy". The question of "the illegal manner in which respondent has handled my tax" was brought up in the Tax Court, adding as well, the dismissals in two District Courts, which denied petitioner his right to be heard on the subject - - all of this together questions whether petitioner ever had a chance to start with. All of this was before the Court of Appeals. (App.17-30)

No consideration was given in the Court of Appeals to the erroneous crediting of refunds or the injury caused to petitioner by the "improper assessment" (the fraud) and credits thereto. (items 4 and 5 in the Court's "Memorandum") (App.33)

Petitioner will concede to the Court's finding in item "6" (App.33)

Petitioner denies item "7" of the Court's "Memorandum". This Court is referred to "IRS Conspiracy" discussed later. (App.33-34)

Petitioner neither denies nor admits to item "8" of the Court's "Memorandum". This Court is referred to "IRS Conspiracy" later discussed.

Petitioner questions the propriety in Court's ruling in item "9" of its "Memorandum". (App.34) As to the question of the 20% deduction on petitioner's 1973 tax return, the Tax Court ruled the negligence penalty was proper in that petitioner took an "arbitrary credit". Said the Court: "It shows a willful disregard for rules and regulations." (App.7)

Petitioner alleges there is nothing in the rules and regulations that allows a penalty for taking an arbitrary credit in this case. Petitioner conformed to the only rules and regulations applicable. Those rules are as follows:

Privacy Act Notice on tax return:

> "Our legal right to ask for information is IRC sections 6001 and 6011 and their regulations. They say that you must file a return or statement with us for any tax you are liable for . . . This is so we know who you are, and can process your return and papers."
>
> "You must fill in all parts of the tax form that apply to you."

Respondent determined that because petitioner did not carry forward to the first page his self-employment tax, that constituted a mathematical error.

Petitioner filled in all parts of the return correctly as to his income and authorized deductions. The fact that he took other deductions, which he explained in an attached schedule, is no valid reason to claim a mathematical error was made. The fact that petitioner did or did not carry figures forward from one schedule to another is no reason to claim petitioner made a mathematical error.

This Court is referred to the following case authorities:

Thompson v. U.S. 308 F. 2d 634 (1962) (App.46); Flast v. Cohen 392 U.S. 83 (1968) (App.47-51); U.S. v. Butler, 297 U.S. 1 (1936) (App.51-54); Fuentes v. Shevin, 407 U.S. 67, 80 (1972) (App.57); Linder v. U.S., 268 U.S. 5,17 (App.57-58); U.S. v. Kahriger, 345 U.S. 22 (1973) (App.58-60)

Internal Revenue Service Conspiracy:

"A" Injury to Petitioner Through Devious Collection Procedure

Notwithstanding the excessive exaction forced on petitioner under the guise of tax, tied to this wrong was a second inevitable wrong - - police state tactics. Respondent seriously injured petitioner in a wilfully concocted and executed fraud.

The relevant facts are as follows:

The Intimidation Tool - Since his action of challenging the excessiveness of the tax, petitioner has been subjected to frequent threats of seizing his property. (respondent's letter, App. 41-42) During a hard time for petitioner when he had no income from any source, his rightful refunds he needed badly to cover his living costs were wrongfully credited, the respondent knowingly holding the refunds without authority. Mile long lines at the time, "snow birds" from the North, patiently waited to collect petitioner's refunds in the form of food stamps in Miami.

IRS Contrivances to Defraud - One of the tools used was an admittedly erroneous assessment, which, among other things, was in excess of petitioner's alleged tax liability. Another tool was the crediting of refunds and overpayments. The credits amounted to a far greater

amount than the total alleged tax, the tax already enjoined from collection pending the Tax Court trial. Long befoe the trial, respondent had collected far more than the alleged tax through "freezing" refunds and still was threatening petitioner with numerous demand notices.

Petitioner challenged respondent in court twice over this fraud, but the respondent deviously succeeded in getting petitioner's two U.S. District Court cases dismissed. Respondent circumvented the above mentioned facts, and to the Court's undeniable error, hoodwinked the Court by focusing on only one point, the least of all points -- the treatment of a $215 overpayment of taxes for 1975. The respondent simply ignored the rest of the complaint. The Court, obviously failing to read petitioner's complaint, Concurred with respondent's slight of hand.

To the Court's further discredit, the argument respondent used to credit the 1975 tax overpayment was that the 1975 overpayment was already paid to petitioner after the fact that it was credited to 1974 taxes already before the Tax Court. Respondent used as its authority section 6512(a) of the Int. Rev. Code. (App.60-61)

The authority utilized to credit the overpayment and one of the refunds (the other refund was "frozen") was Section 6402 of the Int. Rev. Code. (App.60) This regu'ation provides, in part, that the amount of overpayment shall be credited against income tax then due, this not being the case here; and in part, that the credit of the overpayment can only be "properly credited in absense of proof that such assessment was erroneous", this not the case here. Nevertheless, the overpayments and refunds were either credited or "frozen", take your

choice (App.35-36)

Even though it was "clear under no circumstances could the Government ultimately prevail", as was the case in Enochs v. Williams Packing Co., 370 U.S. 1,7 (1962), a prohibition against dismissal, erroneously, two U.S. District Courts dismissed petitioner's complaints. (App. 17-30)

"B" Coercion and Deceit in the Auditing and Assessment Process

As the record indicates, the following took place:

In October 1974, respondent unnecessarily put petitioner through a microscopic examination of his 1973 records at petitioner's office in Lewisville, Texas. The reason given was petitioner's "Tax Protest". (see auditor's memo, verbatim. (App. 44-45)

The examining officer, after completing the audit, told petitioner he had failed to report $5,000 in income. Petitioner knew the accusation was false. Thus, petitioner invited respondent to take the issue to court.

Instead of accepting the challenge, respondent contacted petitioner on March 20, 1975, asking for a re-examination of the same records. Petitioner refused to grant permission, his right pursuant to the provision of 26 U.S.C. section 7605(b).

Petitioner was not allowed to argue this point in the Tax Court. In Respondent's Answers To Petitioner's Interrogatories of March 3, 1978 (App. 61), under item "5": "If you are requesting a section of the I. R.C. dealing with a second examination of a taxpayer's books, Section 7605(b) deals with this.

A copy of this section is attached." This demonstrates that petitioner had it in his mind to bring up the subject before the Tax Court, but was interrupted.

In a second phone conversation, (App. 43), petitioner told respondent he was moving to Florida. Pursuant to IRS regulations (IRS Pub. 586A, Section VI) petitioner is allowed to transfer his case. Respondent told petitioner, "we don't work that way". (last line of respondent's note App.43-44) Petitioner told respondent he did not want his wife brought into the argument. Petitioner told respondent to deal with him only on the matter. The "we don't work that way" was followed by: We will continue the examination with your wife. (letter from respondent to Senator Lawton Chiles, (App.39-40)

Upon the knowledge that petitioner was leaving Dallas permanently, respondent on or about March 20, 1975 "advised" petitioner's

wife. Respondent knew that petitioner had made, what respondent terms "groundless deductions" again on his 1974 joint return challenging again the taxing and spending policies. (See respondent's note App. 43, 2nd para.)

Petitioner's wife took respondent's "advice" and did not sign their already made out joint return for 1974, this fact being unknown to petitioner, as his wife had never mentioned any reservation on signing that return. She did sign the 1973 return, which also had a deduction on constitutional grounds.

Instead of signing the 1974 return, she made out her own separate return for 1974, with no constitutional deduction, paying her part of the tax. She sent the joint return in with only petitioner's signature. A letter was enclosed with the joint return explaining that the joint return was to be treated as petitioner's

separate return. This was done on the "advice" of respondent, who did not advise petitioner of what had been done. (App. 45) This all appears to petitioner to be inappropriate meddling in private matters, and willful concealment from one of the interested parties - - not the rightful role of the Federal Government.

Upon receipt of petitioner's separate, or joint return, whichever the case may be, the Service Center treated it as a joint return. Noting the deductions, and no payment of taxes, the Service Center issued a fraudulent assessment captioned: "Joseph W. and Doris M. Smith, Jr. Several changes were made on the return - - those erroneous, too.

The assessment was sent to both petitioner in Miami, Florida and his wife in Lewisville, Texas on May 8, 1975. This assessment remained in force with the knowledge it was erroneous. (See res-

pondent's letter and note c.c. to wife. (App. 41-42) It is common knowledge, according to the Tax Court, that IRS routinely resorts to these erroneous assessments, knowingly. It can be only for one reason: to collect more revenue.

Unknown to petitioner, respondent did re-examine petitioner's 1973 tax records with his wife in violation of section 7605(b) of the Code. Petitioner questions the right of respondent to ignore either party when examining the records on a taxable year where a joint return is filed.

Thus, respondent did further intrude upon petitioner's privacy in that illegal act. "Where on initial visit to taxpayer's place of business, revenue agent was unable to reconcile gross receipts with reported bank deposits," as was the case

here, "he (petitioner) could have resisted agent's proposed visits and forced the government to resort to subpoena." U.S. v. House, 524 F 2d 1035, 1043 (1976) Petitioner was not given this opportunity.

This Court has noted that courts should intervene when taxpayers are able to show that Internal Revenue agents seeking further information by inspection of books have abused their discretion in wielding extensive powers granted them by the Int. Rev. Code. U.S. v. Crespo 281 F Supp 928 (1968).

The demise here is that respondent willfully kept petitioner out of the case, effectively discrediting petitioner, and at the same time gaining the confidence of petitioner's wife - - using her to gain entrance and audit petitioner's 1974 records. Respondent split the income. Corrections were made as to deductions. Respondent actually made out a new corrected return - - all done without

petitioner's knowledge or consent. The obvious idea was that if petitioner was not going to co-operate and pay his taxes, respondent would see that he did.

In July 1975, petitioner returned to Dallas from Florida and discovered all that had taken place in his absence. Respondent, at that time, under the pretext of complying with the law, audited petitioner, who had none of the records for the year which was being audited, the records being in wife's possession. She had a restraining order prohibiting petitioner from having the records.

During this encounter, petitioner presented the erroneous assessment he had received in Florida, on which by this time he had been threatened with forced collection. Respondent assured petitioner there was nothing to be concerned about. The assessment would be voided and a Notice of Deficiency would be issued to petitioner.

But, IRS decided to play the game differently. Petitioner returned to Florida in November 1975. Immediately, petitioner was called into the local office in West Palm Beach and told he had two choices: either pay the erroneous assessment at once or have his property seized. Petitioner was told that he was one of those "Fifth Amendment freaks" and he wasn't going to beat the income tax laws. Petitioner refused to pay. Nothing was done until June 1976. (see respondent's letter, App.41-42)

On June 22, 1976, respondent sent a letter to petitioner offering to abate the assessment, but not to void it. Petitioner rejected the offer. The assessment was left to stand and did remain in force, uncollected, but used as the instrument to credit petitioner's overpayment and refunds. It remained in force until the Tax Court trial on June 19, 1978 at which time it was abated.

CONCLUSION

Respondent claims the power to tax is unlimited. The United States Tax Court, without qualification, concurred with that opinion and was affirmed in its opinion by the United States Court of Appeals.

Under the extraordinary circumstances presented herein - - the minority taxpayer interests being ignored in favor of a majority - - who, this Court is asked, other than the aggrieved party is the proper party to challenge the question presented here? There is no countervailing force other than the Constitution itself as the remedy for the problem.

Petitioner has placed before this Court this question: the exaction forced upon him disassociates taxing and spending from unrevokable and non-conferrable personal rights. Respondent, in order to work its will on petitioner, resorted to conspiracy and fraud

to circumvent the law.

Wherefore, petitioner respectfully requests that the unfair exaction, a de facto deprivation of rights, a confiscation of property collected illegally, be enjoined from collection permanently.

Respectfully submitted,

JOSEPH W. SMITH, JR.
1786 S.W. Greenway Circle
West Linn, OR 97068
(503) 638-9484

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing PETITION FOR WRIT OF CERTIORARI with APPENDIX have been served by mail to each of the following parties, and addressed as follows:

Three (3) copies to: Commissioner of Internal Revenue
1111 Constitution Ave. N.W.
Washington, D.C. 20530

Three (3) copies to: Solicitor General
Department of Justice
Washington, D.C. 20530

80-1570

Office-Supreme Court, U.S.
FILED
MAR 16 1981
ALEXANDER L. STEVAS,

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

NO.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1980

JOSEPH W. SMITH, JR.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOSEPH W. SMITH, JR.
1786 S.W. Greenway Circle
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Pro Per

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

UNITED STATES TAX COURT

JOSEPH W. SMITH, JR.,
Petitioner,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET NO. 9724-76
9725-76

MEMORANDUM SUR ORDER

On August 1, 1978, respondent submitted to the Court a computation of petitioner's Federal income tax deficiencies for the 1973 and 1974 taxable years pursuant to the decision of the Court on June 20, 1978. At that hearing, there appeared to be no disagreement between the parties concerning respondent's computation of petitioner's income tax for both years. For the reasons thus set forth in the transcript, the Court finds:

(1) An overpayment is due to petitioner for the 1973 taxable year in the amount of $360.36.

An addition to tax is due from petitioner for the 1973 taxable year under section 6653(a) Int. Rev. Code of 1954, in the amount of $61.91.

(2) A statutory deficiency in income tax is due from petitioner for the 1974 taxable year in the amount of $640.96. No addition to tax is due from petitioner for the 1974 taxable year under the provisions of section 6653(a), Int. Rev. Code of 1954.

Appropriate decisions will be entered.

WILLIAM H. QUEALY
Judge

Dated: Washington, D.C.
September 22, 1978

UNITED STATES TAX COURT

JOSEPH W. SMITH, JR.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Docket No. 9725-76

DECISION

For reasons stated in the Memorandum Sur Order issued September 22, 1978, in this case, it is

ORDERED and DECIDED that there is a statutory deficiency in income tax due from petitioner for the 1974 taxable year in the amount of $640.96.

There is no addition to tax due from petitioner for the taxable year 1974 under the provisions of Section 6653(a), Int. Rev. Code of 1954.

WILLIAM H. QUEALY
Judge

ENTERED: September 26, 1978

UNITED STATES TAX COURT

JOSEPH W. SMITH, JR.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Docket No. 9724-76

DECISION

For reasons stated in the Memorandum Sur Order issued September 22, 1978, in this case, it is

ORDERED and DECIDED that there is an overpayment due to petitioner for the 1973 taxable year in the amount of $360.36.

That there is an addition to tax due from petitioner for the 1973 taxable year pursuant to Section 6653(a), Int. Rev. Code of 1954, as amended, in the amount of $61.91.

WILLIAM H. QUEALY
Judge

Entered: September 26, 1978

From the Transcript of Proceeding Before the United States Tax Court June 19, 1978:

Respondent's amendment to the assessment was received as filed, the Court claiming no jurisdiction over the self-employment tax portion of the assessmet, that part of it being left in place and not appealable before the Tax Court(p.3,4 transcript)

The Court ruled the 1973 tax liability would be paid in full. (p. 9 transcript)

The Court ruled there was nothing illegal in respondent's handling of petitioner's taxes. When petitioner's wife filed a separate return, this entitled respondent to go to her for the records. It was not necessary to audit petitioner. As to the re-examination of the 1973 records, the Court: "that is neither here nor there." (this is petitioner's presumption) (p. 15, 16 transcript)

The Court ruled petitioner's 1974 return would be treated as a separate return. (p. 19 transcript)

As to the "improper assessment", the Court: "I don't know how you expect anybody to try a case in this posture." (This remark to respondent) (p. 23 transcript)

On petitioner's question of the assessment being held void, the Court: "But it isn't void . . . It may be too high, it may be too low and so forth . . ."(p. 27 transcript)

From the Transcript of Proceeding on June 20, 1978:

On petitioner's statement that neither the District Court nor the Tax Court claimed jurisdiction over the "improper assessment", the Court: "Actually, when you file a petition with this Court, the collection of the amount in dispute is automatically suspended, . . . with the proceeding in this court . . . But that only applies to certain types of taxes. . . The so-called 'mathematical error' is not subject to appeal in this Court, but if it's not a mathematical error, you can go ahead and challenge the right to

make the assessment in the District Court, I assume." (p. 42,43 transcript)

As to the negligence penalty for 1974, the Court: "I'm not going to give the negligence penalty because I think that somebody's been negligent on the other side here, too. There's too much confusion here." (p.46 transcript)

As to the neglignece penalty for 1973, the Court allowed the penalty because petition took an arbitrary credit against the tax. "It shows a wilfull disregard for rules and regulations." (p.47 transcript)

From the Transcript of Proceeding on August 1, 1978:

As to petitioner's objection to respondent's computation, which took into account petitioner's overpayment of 1975 taxes and his refund due from 1976, tax years not before the Tax Court, the Court allowed the 1975 overpayment to be credited to petitioner's 1974 tax liability and the 1976

refund to be credited to petitioner's 1973 tax liability.

As to petitioner's question on a 1975 tax refund due, the Court: "Well, we don't have that before us."

As to petitioner's question of why a 1975 tax overpayment and a 1976 tax refund were considered in the Court's findings, but a 1975 tax refund was not before the court, the Court: "The respondent has the obligation to credit any overpayment against the deficiency."

As to respondent's acknowledgement that there was a 1975 tax refund due petitioner, the Court: "Well, what happened to it?
Respondent: "It should be applied to his account. He (petitioner) should be receiving the refund."
The Court: "and he'll get a refund then?"
Respondent: "Yes, Your Honor."
The Court: "In dollars - - not applied to this account?
Respondent: "Well, I suppose the excess,

whatever may be outstanding, would be applied.

The Court: In other words, this will be used to pay the amount?

Respondent: "I would assume so, Your Honor, yes."

The Court: "Right. So that's your answer, Mr. Smith."

Petitioner: "I don't have an answer."

The Court: "Well, that's the only answer I can give you."

UNITED STATES TAX COURT

JOSEPH W. SMITH, JR.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Docket No. 9725-76

ORDER

This case was called from the calendar for the Motions Session of the Court at Washington, D.C. on November 23, 1977 for hearing on petitioner's motion to dismiss, filed October 20, 1977. There was no appearance by or on behalf of the petitioner. Counsel for respondent was heard on the motion. After due consideration, and for cause appearing in the transcript of the proceedings, it is ORDERED that petitioner's motion to dismiss is denied.

RANDOLPH F. CALDWELL, JR.
Special Trial Judge

Dated: Washington, D.C.
November 23, 1977

From the Transcript of Proceeding on November 23, 1977

(From pages 3-5)

Respondent: ". . . petitioner neither computed the self-employment tax nor carried a self-employment tax figure over to page 2 for entry on line 55 where he would otherwise show a computation of his tax liability. He entered a regular income tax figure on line 16 Form 1040, on page 1 of $429, based upon his computation from page 2 with itemized deductions and exemptions taken out. Although line 17 is available to show the total of tax credits, he did not claim a credit on that line. Neither did he add any total from page 2 of other taxes for the total of self-employment tax. However, on line 23, petitioner took a credit of the $429 which he had just shown as his stated liability, and he entered a figure of zero tax owed as a 'balance due IRS'. The result of this gamesmanship for the year 1974 posed a problem for the Service Center

clerk who processed that return. By entering three separate times the net earnings from self-employment, the clerk logically concluded petitioner erred in computing . . . and made a mathematical error in quotes, adjustment to the return. This conclusion was made, not withstanding, the following statement that was handwritten across the Schedule SE" 'This program is a fraud - - unconstitutional extortion, taking and giving nothing in return'. However, petitioner did not say on that schedule that he was not liable for the self-employment tax. (He said it in an attached schedule) The clerk processing the 1974 return did not have the benefit of the 1973 return and concluded that this was in effect a mathematical error. The $429 credit for regular income tax on page 1 of the return was supported by a typed page of frivolous constitutional protestations attached to the return. The clerk processing the return inadvertently considered the $429 credit to be a mathematical error. Contrary

to the treatment of the 20 percent credit, on the 1973 return which was not considered as a mathematical error by the Service, within the meaning of Code Section 6213(b)(1). Accordingly, an assessment was made for both the $429 credit of total tax liability that was shown on the return, plus the $1005.34 self-employment tax which was not carried over to be shown on page 2 and page 1 of Form 1040 as it should have been. Needless tosay, the $429 credit should have been treated as it was in 1973 as a protested amount and no assessment should have been made for that amount. However, respondent believes a reasonably prudent clerk in the Service Center has every right to conclude that the petitioner had made a mathematical error within the meaning of Code Section 6213(b)(1) in not computing the tax due from the self-employment income stated three separate times on Schedule SE.

(From page 5 of transcript)

THE COURT:" . . . the matter that Mr. Smith is complaining about probably does present a judicial issue that this Court could pass upon, and should pass upon, if it is properly raised. and, I think the way to raise that is to allow Mr. Smith to file an amendment to his petition to say that the Respondent erred . . ."

UNITED STATES TAX COURT

JOSEPH W. SMITH, JR.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

AMENDMENT TO PETITION

Assignment of Errors:

(1) The Notice of Deficiency did not indicate the correct alleged tax in question.

(2) Respondent's mathematical computations and billing are incorrect on the Service Center Assessment

(3) Respondent violated the Int. Rev. Code of 1954, Sec. 6213(a) providing in relevant part that no assessment of a deficiency and

no collection activity with regard to a deficiency in Federal Income Taxes determined by the Service shall be made until the decision of the Tax Court.

(4) Respondent violated Amendment V of the U.S. Constitution, the Due Process Clause, through the misapplication of the provisions of Section 6213 (b)(2).

(6) Respondent treated Petitiioner's joint return as a separate return with no authority.

(7) Respondent violated the provision of the Privacy Act of 1974 with respect to the auditing and collection procedures used in Petitioner's case.

(8) Respondent violated established Int. Rev. Service policy with respect to petitioner's move to another geographical location as related to IRS audits.

Wherefore, it is prayed that any and all assessed and already collected taxes for

1974 be returned to petitioner with interest; and further, that additional opérating loss refunds applied for in April 1977 by petitioner, and now being "investigated" by respondent, for no explained reason, be promptly returned to petitioner with interest.

JOSEPH W. SMITH, JR.

Date Filed: May 22, 1978

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

JOSEPH W. SMITH, JR.,
individually, Plaintiff,

vs.

DIRECTOR OF INTERNAL REVENUE, et al.,
Defendant.

Docket No. 77-8119-Civ-CF

(filed July 28, 1977)

O R D E R

This cause came before the Court on defendant's motion to dismiss.

On plaintiff's 1973 and 1974 income tax returns, plaintiff did not pay self-employment taxes and refused to use the government's formula for determining his capital gains tax. Plaintiff indicated that he intended to challenge the constitutionality of the self-employment and capital gains tax. The Internal Revenue Service has filed notices of deficiency for 1973 and 1974. Thereafter, the plaintiff petitioned the United States Tax Court for review, where

the case is now pending. Plaintiff has commenced this present action for a refund of plaintiff's overpayment of 1975 taxes.

Where there is an overpayment of any internal revenue tax, Section 6402(a) of the 1954 Code provides that such overpayment, including any interest allowed thereon, may be credited against "any liability in respect of an internal revenue tax on the part of the person who made the overpayment." 26 U.S.C. section 6402(a); 10 Mertens on the Law of Federal Income Taxation section 58.38 (1976). The Internal Revenue Service has applied the 1975 overpayment against plaintiff's tax deficiencies for 1973 and 1974, pursuant to its authority. Since the overpayment on plaintiff's 1975 income tax return was fully allowed as a credit on plaintiff's 1973 and 1974 tax liabilities, the plaintiff has not stated a claim for a refund.
(See App. 60)

Plaintiff's tax liabilities for 1973 and 1974 are now pending before the tax court. If the tax court rules in favor of the taxpayer regarding the controversy of his 1973 and 1974 tax obligations, the taxpayer may then perfect his claim for a refund of the overpayment of his 1975 taxes and invoke the jurisdiction of this Court. It is thereupon

ORDERED and ADJUDGED that his Complaint be and the same is hereby dismissed without prejudice.

DONE and ORDERED at West Palm Beach, Florida, this 28th day of July, 1977.

CHARLES B. FULTON
District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

JOSEPH W. SMITH, JR.,
individually, Plaintiff,

vs.

DIRECTOR OF INTERNAL REVENUE, et al.,
Defendant.

Docket No. 77-8119-Civ-CF
(filed October 21, 1977)

O R D E R

The Court is in receipt of a letter from the plaintiff which is construed to be a motion for reconsideration.

The Court's Order of dismissal explained the reasons therefore. Immediately upon the receipt of the dismissal Order, the plaintiff was priveleged to seek appellate review, which apparently was not done. Although this plaintiff is proceeding pro se, his scathing and vituperative criticism of the Court's Order of dismissal of the cause requires no response other than reference to the reasons that were set out in that Order. It is thereupon

ORDERED and ADJUDGED that plaintiff's letter - motion for reconsideration is denied.

DONE and ORDERED at West Palm Beach, Florida, the 21 st day of October, 1977.

CHARLES B. FULTON
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

JOSEPH W. SMITH, JR.,
Individually, Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

Docket No. Civil No. 78-129

FINDINGS AND RECOMMENDATION

After the Internal Revenue Service (IRS) assessed the plaintiff for deficient payment of income taxes in 1973 and 1974, plaintiff filed an action in the United States Court challenging the assessment. He also claimed the right to have income tax overpayments for the year 1975 refunded. It is unclear whether the Tax Court action is still pending. Since plaintiff filed the Tax Court action, the IRS has found that plaintiff did overpay his 1975 income taxes, and it has credited the overpayment to the alleged deficiencies. In this action, plaintiff seeks a declaration that (1) the assess- . . . . . .

ment and collection of any and all of plaintiff's 1973 and 1974 income taxes are illegal prior to a pending hearing in the Tax Court, and (2) all refunds applied for by plaintiff on his 1975 and 1976 income taxes, which have been in part credited to his alleged tax liabilities, are refundable without further delay.

Plaintiff filed a substantially similar action in the United States District Court for the Southern District of Florida which was dismissed by Judge Fulton on July 28, 1977, for failure to state a claim upon which relief may be granted. Judge Fulton found that since the IRS applied plaintiff's 1975 overpayments to his 1973 and 1974 deficiencies, plaintiff was precluded from seeding a refund of the overpayments until such time as the Tax Court found that the IRS was incorrect in finding that plaintiff was deficient in his income tax payments for 1973 and 1974. The government has moved to dismiss this action contending that

the complaint fails to state a claim upon which relief may be granted and the court lacks subject matter jurisdiction.

The complaint does fail to state a claim upon which relief may be granted. This court cannot give declaratory judgments in tax matters. 28 U.S.C. Section 2201 Handeland v. C.E.R. 519 F. 2d 327, 329 (9th Cir. 1975). Therefore, this court cannot give the plaintiff the declaratory relief he seeks. In addition, as to the 1975 overpayment, plaintiff has not stated a claim because, as Judge Fulton found, the IRS has applied that overpayment to plaintiff's 1973 and 1974 tax deficiencies. 26 U.S.C. Section 6402(a). Plaintiff would not have a claim for return of the overpayment until such time as the tax Court determines that the IRS was incorrect in finding the deficiencies. Moreover, Judge Fulton's order should bar plaintiff, as a matter of res judicata, from litigating the question of whether the overpayment is returnable at

this time.

This Court has no subject matter jurisdiction over plaintiff's challenge to the IRS's deficiency assessment. Plaintiff has not paid the full amount of the alleged deficiency. A taxpayer must pay the full amount of an income tax dificiency assessed by the IRS before he may challenge its correctness in a suit brought in a federal district court. Flora v. United States, 357 U.S. 63 (1938). He is free to litigate in the Tax Court without advance payment. Flora, supra at 75.

This Court is without subject matter jurisdiction for yet another reason. Plaintiff has filed a petition in the Tax Court challenging the IRS assessment. The filing of a petition in the Tax Court gives that court exclusive jurisdiction. 26 U.S.C. section 6512(a); Dorl v. C.I.R., 507 F. 2d 406,407 (2d Cir. 1974).

Accordingly, defendant's motion to dismiss should be granted.

Dated this day of July, 1978

GEORGE E. JUBA
United States Magistrate

Petitioner's Note -

The Courts findings are each and every one after the fact of:

(1) a fraudulent assessment to which there were illegal credits/freezing of petitioner's overpayments and refunds.

(2)a tax enjoined from collection by petitioner's pending Tax Court case.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

JOSEPH W. SMITH, JR.,
Individually, Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

Civil No. 78-129

O R D E R

I have made a de novo review of those portions of the Magistrate's findings and recommendation to which objection has been made. The findings and recommendation are affirmed and the action will be dismissed.

Dated: December 4, 1978

ROBERT BELLONI
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

JOSEPH W. SMITH, JR.
Individually, Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Civil No. 78-129

JUDGMENT

This action is dismissed.

Dated: December 4, 1978

ROBERT BELLONI
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

JOSEPH W. SMITH, JR.,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

Civil No. 78-129

ORDER

On July 27, 1978, Magistrate Juba made findings and recommendation that defendant's motion to dismiss be granted.

On August 2, 1978, plaintiff filed a memorandum on the findings and recommendation. The defendant, on August 28, 1978, filed a memorandum supporting the findings and recommendation. On August 2, 1978, plaintiff filed an addendum to his memorandum. On September 5, 1978, plaintiff filed a second addendum.

On December 5, 1978, I filed an order affirming the magistrate's findings and re-

commendation. Judgment dismissing this action was filed December 5, 1978.

On December 8, 1978, plaintiff filed a motion for reconsideration of findings and opinion of the Court and alternatively for a more definite statement of opinion. The case in this court is now final.

Defendant's motion, filed December 8, 1978, is denied.

Dated: December 12, 1978.

ROBERT BELLONI

United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH W. SMITH, JR.,
Petitioner-Appellant,
vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

Appeal from a decision of the
United States Tax Court

Submitted December 8, 1980
Decided December 23, 1980

Docket No. 79-7039

MEMORANDUM

Before: GOODWIN, SNEED and REINHARDT,
Circuit Judges

Despite the fact that the amount of taxes owed by the taxpayer may well be less than the amount the United States must spend to collect that amount, this is a case in which the excess should be expended to validate once more the legitimacy of the federal income tax.

Appellant Smith was found by the Tax Court to owe $690.96 with respect to the 1974 tax year and $61.91 with respect to 1973. We affirm the Tax Court's judgment. Smith raises numerous issues in this appeal with which we will deal quite briefly. None are meritorious.

1. Smith alleges that the income tax laws violate the Due Process Clause of the Fifth Amendment. This is not so. See Brushaber v. Union Pacific R.R. 240 U.S. 1, 24-25 (1916). This is an issue settled long ago.

2. Smith contends the Tax Court denied him a hearing on his due process claim. Smith is in error; the Tax Court heard him and rejected his claims.

3. Smith insists that the Commissioner violated 26 U.S.C. Section 7605(b). There is no evidence to support this claim in the record and it does not appear to have been

raised in the Tax Court.

4. Smith complains about the Commissioner's erroneous assessment. This was abated prior to trial and thus caused no injury to Smith. Corrected miscalculations by our creditors are annoyances but not legally cognizable injuries normally.

5. Smith complains about the completion of the self-Employment Schedule by the Revenue Service. However, the Service did no wrong. Smith owed the tax and does not show that any mathematical error exists. No right of Smith was violated.

6. Smith asserts the Tax Court erred infinding that he and his wife did not file a joint return in 1974. We have examined the record and hold that the Tax Court finding is proper.

7. The legality of the 1975 5ax overpayment was decided against Smith in Smith

v. Director of Internal Revenue, 40 A.F.T.R. 2d 5553 (S.D. Fla. 1977), and is now barred by res judicata.

8. Smith's complaints regarding his 1976 return were not before the Tax Court and will not be considered here.

9. Smith contends that the Tax Court wrongfully imposed the 5% negligence penalty. We disagree. Under the circumstances of this case the penalty was proper.

Affirmed.

UNITED STATES TAX COURT

JOSEPH W. SMITH, JR.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Docket No. 9724-76, 9725-76

RESPONDENT'S ANSWERS TO PETITIONER'S INTERROGATORIES

THE RESPONDENT, in response to the interrogatories served by petitioner on or about March 20, 1978, answers as follows:

Attached hereto and identified as Exhibit B is a true and correct copy of petitioner's transcript of account for the year 1973. The transcript reflects that $1695.40 is presently (as of October 19, 1977) being held in that account. The $1,695.40 represents a tentative carryback allowance from petitioner's 1976 income tax return. Respondent is informed that such amount is being held in the 1973 account because of a "freeze" on petitioner's accounts brought about by

the Tax Court actions. Respondent is also informed that the "freeze" of a taxpayer's accounts is routine when there is litigation pending involving a taxpayer's account. Respondent does not know of other monies being witheld from petitioner, but if there is, it is respondent's understanding that the reason for such witholding is the "freeze" brought about by the Tax Court litigation.

STUART E. SEIGEL
Chief Counsel
Internal Revenue Service

Dated: April 10, 1978

By: JOHN D. PICCO
ASSISTANT REGIONAL COUNSEL

1500 S.W. First Ave.
810 Crown Plaza
Portland, Oregon 97201
Tel. No. (503) 221-3185

INTERNAL REVENUE SERVICE CENTER

Southwest Region
P.O. Box 937
Austin, Texas 78767

September 6, 1974

Mr. Joe W. Smith, Jr.
Rt. 1, Box 73AB
Lewisville, Taxas 75067

Dear Mr. Smith:

I am glad to respond to your letter of August 19 addressed to me and your letter of July 12 addressed to Attorney General William B. Saxbe, which has been passed along to me for reply.

You asked if the Congress has the right to tax any amount of personal income tax up to 100%, with no limitations.

The 16th amendment to the Constitution, which was passed by Congress in 1909 and finally ratified by three-fourths of the States in 1913, provides: . . . . . .

This amendment, which has been upheld by the

Supreme Court, makes no mention of limitations, so I assume that Congress has the power to tax total income at a given level. It has never done so. I doubt if it ever will.

You also ask why the Federal Government finds it necessary to redistribute income. Mr. Smith, I'm sure you know that the matter of spending authority is a responsibility of the Congress. Many factors influence the budget. Congress spends countless hours studying and debating the spending program, so I would certainly be less than honest if I tried to explain the merit and justification for the many spending programs included in the Federal budget.[1]

. . . . As a final note, I must point out that there is no legal authority for anyone to withold payment of a portion of their taxes on the basis of disagreement with the expenditure of Federal funds. The Internal Revenue

1 - Why is he not willing to let the courts determine the issues petitioner petitioned the courts to to determine.

Service will be required to examine and assess any such amounts that you might have withheld or deducted from your tax returns. A representative of the District Director's office in Dallas will likely contact you in the near future to review your prior year returns.[1]

Sincerely,

ERVIN B. OSBORN
Director

INTERNAL REVENUE SERVICE

1100 Commerce St.
Dallas, Tex. 75202

June 18, 1975

HONORABLE LAWTON CHILES
United States Senate
Washington, D.C. 20510

Dear Senator Chiles:

Mr. and Mrs. Joe W. Smith, Jr. filed a joint Federal income tax return for 1973. This return was signed by both taxpayers. The amount of income tax owed was computed correctly on the return; however, the taxpayers deducted 20% from the total tax due because

1 - Field Auditor John Lackey examined petitioner's 1973 tax year records in Oct. 1974.

they felt that approximately this amount of their tax money would be spent by the Federal Govenment on social reform and other programs which they did not support.

Their return was assigned to an Internal Revenue agent for examination. The agent worked with Mr. Smith until the examination was almost complete.[1] At this point, Mr. Smith decided to leave the Dallas area and move to Florida. Since Mrs. Smith filed a joint return with her husband and has all of their records in her possession, the revenue agent did not violate any Internal Revenue policy or Internal Revenue law in completing the examination with Mrs. Smith.

After the agent's report has been reviewed for completeness, the taxpayers will be offered a conference either in Dallas or Miami, Florida to attempt to reach a satisfactory agreement on whether or not the 20% deduction is legal.

1 The original examination was in Oct. 1974. Respondent requested a re-examination on Mar. 20, 1975.

If you desire any additional information on this case, please advise.

Sincerely yours,

A.W. McCanless
District Director

INTERNAL REVENUE SERVICE

701 Clematis Street
West Palm Beach, Fla. 33401

June 4, 1976

Joseph W. Jr. & Doris M. Smith
P.O. Box 1621
West Palm Beach, Fla. 33402

Dear Mr. Smith:

This letter is regarding our conversation on May 28, 1976, about your desire to petition Tax Court. I have been in contact with Philip Talbot, Chief of Conference in Dallas, and Dan Eberstein, Chief of Conference in Jacksonville.

Your audit files will be transferred from Dallas, and our district will issue Statutory Notices of Deficiency per your request. These notices will reflect the audit adjustments only, not the adjustment due to a

correction notice sent to you when you filed your 1974 return. When you receive the Statutory Notices of Deficiency, you will have 90 days to petition Tax Court.

The collection action on the $1382.99 tax due (plus penalties and interest) on your 1974 account will have to proceed, because it was generated by a correction notice from the Service Center, not an audit adjustment. The Service Center notified you that you had failed to transfer an income figure from a schedule to the face of the return. The collection action will proceed even if you include an argument about the Service Center correction notice in your petition to Tax Court.[1] A Revenue Officer from our office will be in touch with you about the 1974 bill due.

Very truly yours,

CAROL KNAPP
Office Audit Group
Manager

c.c. Route 1, Box 73AB
Lewisville, Texas 75067

1 - Refer to respondent's "Statement of Circumstances App. 45

VERBATIM COPIES OF HAND WRITTEN IRS OFFICE MEMORANDA WRITTEN BY FIELD AUDITOR JOHN LACKEY, DALLAS AUDIT DIVISION

Note of March 20, 1975

"Phone conversation with Joe Smith. He is leaving for Florida this weekend - - getting a divorce, wife is out of town - - will be back the Monday after Easter. Said all books and records will be here.

He also stated that he was reducing his 1974 taxes just as he did his 1973 taxes."

Note of March 20, 1975 - 12:35 P.M.

"Smith called back and told me he did not want me looking at his books at this time, he didn't have time and his personal life has been greatly disrupted. He said we could continue the audit when he gets settled in Fla.

He said since he was going to court anyway to go ahead and write up whatever I'd found. I told him we didn't work that

Above notes concerning re-examination of 1973 records

way that we got explanations before going to court."

Note describing the Audit of petitioner's records for 1973 taxes. Note written on July 9, 1975

"Mr. Smith is very vocal about his discontent with the policies of the U.S. Government. Throughout the examination Mr. Smith would interrupt the audit to bring up a point or argument pertaining to his discontent. Mr. Smith did not intentionally attempt to delay or hinder the audit but his continuous interruption made it difficult to work.

Mr. Smith has a successful lumber dealership in Lewisville. His discontent stems from the fact that he works hard and pays taxes and others on welfare do no work and are given his tax money to live on by the government.

Smith's refusal to answer questions or aid in expiditing the audit caused considerable time to be spent in tracing income and expense items. Smith's answer in response to questions

Note- This report written on July 9, 1975 concerned the audit of petitioner's 1973 tax records. That audit took place in Oct. 1974. Director McCanless wrote Senator Chiles on June 18, 1975. His letter indicated the examination was ongoing at the time petitioner left for Florida.

was 'it's in the books and records'."

Note written August 17, 1975

"Statement of circumstances surrounding the 7712 tax returns of Joe and Doris Smith"

"On 3-19-75 Je Smith, Jr. signed and dated a 1974 tax return prepared by him. This return was prepared as a joint tax return. He presented the return to his wife Doris M. Smith who was supposed to sign the return and mail it to IRS. The Smith's being separated at the time. Mrs. Smith did not sign the return but mailed the return as it was to Austin. The return was processed as a joint return even though it was not signed by both spouces. Mrs. Smith then filed an amended separate return dated April 9, 1975 with a letter stating the prior return of 3-19-75 was an invalid joint return since she had not signed it and that her separate return reported income and expenses in the correct manner." [1]

1 - Refer to IRS letter of June 4, 1976. More than 1 year later, respondent collected on invalid joint return. See App.42, last para.

The purpose of the audit calculations is to determine correct income and expenses and to make adjustments to the two tax returns to make them conform to IRS regulations concerning the filing of married filing separate status.

APPLICABLE CASES

THOMPSON v. UNITED STATES 308 F 2d 634 (1962)

". . . The Internal Revenue Act provides for complete and exclusive relief to taxpayers who feel aggrieved by the rulings of the Commissioner. Thus, it is clear that Congress has provided two, and only two, basic procedures by which a taxpayer may challenge the legality of a tax or an assessment:

(1) he may decline to pay and provided the proper steps are taken, he may have a determination of his problem before collection and payment of the tax. 26 U.S.C. section 6213. This is commonly known as the Tax Court route, the decision in which may be reviewed on the record before the Court of Appeals . . ."

FLAST v. COHEN, 392 U.S. 83 (1968)

FLAST AT 97:

"Federal judicial power is limited to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process.

Additional uncertainty exists in the doctrine of justiciability because that doctrine has become a blend of constitutional requirements and policy considerations. And a policy limitation is 'not always clearly distinguished from the constitutional limitation.' Barrows v. Jackson 346 U.S.249, 255 (1953) . . ."

"The 'many subtle pressures' Poe v. Ullman, 367 U.S. 497, 508 (1961) which cause policy considerations to blend into the constitutional limitations of Article III make the justiciability doctrine one of uncertain and shifting contours . . ."

FLAST AT 98:

"As we understand it, the Government's position is that the constitutional scheme of separation of powers, and the deference owed by the federal judiciary to the other two branches of government within that scheme, present an absolute bar to taxpayer suits challenging the validity of federal spending programs. The Government views such suits as involving no more than the mere disagreement by the taxpayer "with the uses to which tax money is put". According to the Government, the resolution of such disagreements is committed to other branches of the Federal Government and not to the judiciary. Consequently, the Government contends that, under no circumstances, should standing be conferred on federal taxpayers to challenge a federal taxing or spending program. An analysis of the function served by standing limitations compels a rejection of the Government's position."

FLAST AT 99:

"The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated. The 'gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.' (Baker v. Carr, 369 U.S. 186,204 (1962)"

FLAST AT 102:

"First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. Thus, a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, Section 8, of

the Constitution . . . Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. Under this requirement, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, Section 8. When both nexuses are established, the litigant will have shown a taxpayer's stake in the outcome of the controversy and will be a proper and appropriate party to invoke a federal court's jurisdiction."

FLAST AT 105:

"We have noted that the Establishment clause of the First Amendment does specifically limit the taxing and spending power conferred by Art. I, Section 8. Whether the Constitution contains other specific limitations can be determined only in the context of

future cases. However, whenever such specific limitations are found, we believe a taxpayer will have a clear stake as a taxpayer in assuring that they are not breached by Congress. Consequently, we hold that a taxpayer will have standing consistent with Article III to invoke federal judicial power when he alleges that congressional action under the taxing and spending clause is in derogation of those constitutional provisions which operate to restrict the exercise of the taxing and spending power. The taxpayer's allegation in such cases would be that his tax money is being extracted and spent in violation of specific constitutional protections against such abuses of legislative power."

UNITED STATES v. BUTLER 297 U.S. 1 (1936)

BUTLER AT 66:

"While, therefore, the power to tax is not unlimited, its confines are set in the clause which confers it, and not in those of Section 8 which bestow and define the

legislative powers of the Congress. It results that the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution.

But the adoption of the broader construction leaves the power to spend subject to limitations.

As Story says:

'The Constitution was, from its very origin, contemplated to be the frame of a national government, of special and enumerated powers, and not of general and unlimited powers.'

Again he says:

'A power to lay taxes for the common defence and general welfare of the United States is not in common sense a general power. It is limited to those objects. It cannot constitutionally transcend them.'"

BUTLER AT 83:

(Justice Stone dissenting the first transfer of income scheme of any consequence)

"Expenditures would fail of their purpose and thus lose their constitutional sanction if the terms of payment were not such that by their influence on the action of the recipients the permitted end would be attained."

BUTLER AT 85: "It is a contradiction in terms to say that there is power to spend for the national welfare, while rejecting any power to impose conditions reasonably adapted to the attainment of the end which alone would justify the expenditure."

BUTLER AT 87: "The power to tax and spend is not without constitutional restraints. One restriction is that the purpose must be truly national. Another is that it may not be used to coerce action left to state control. Another is the conscience and patriotism of Congress and the Executive. 'It must be remembered that legislators are the ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.' Justice Holmes, in . . . . . .

Missouri, Kansas & Texas Ry. Co. v. May, 194 U.S. 270.

A tortured construction of the Constitution is not to be justified by recourse to extreme examples of reckless congressional spending which might occur if courts could not prevent - - expenditures which, even if they could be thought to effect any national purpose, would be possible only by action of a legislature lost to all sense of public responsibility."

YANNICELLI v. NASH 354 F.Supp 143 (1973)

YANNICELLI AT 145:

Declaratory Judgment - Where taxpayer was not seeking a premature judicial declaration concerning merits of his federal tax assessment and whether he owed government unpaid taxes, but merely sought a determination of legality of tax lien and levy independent from merits of deficiency assessment, prohibition regarding federal taxes within Declaratory Judgment Act could not be used

to shield Internal Revenue Service from judicial review of alleged constitutional violations resulting from enforcement of tax collection procedures. 28 U.S.C.A. Sections 2201, 2410; 26 U.S.C.A. (I.R.C. 1954) Section 7421."

Internal Revenue - "Provision of Internal Revenue Code that, except as provided, no suit for purpose of restraining assessment or collection of any tax shall be maintained in any court does not prohibit any and all suits to restrain assessment or collection of a tax; such a suit may be maintained if complainant shows existence of special and extraordinary circumstances sufficient to bring case within some acknowledged head of equity and demonstrates that United States cannot establish its tax claim. Fed. Rules Crim. Proc. rule 41(e), 18 U.S.C.A."

YANNICELLI AT 151:

IV (19) Plaintiff's money has already been assessed and collected prior to this suit. Consequently, he seeks to show that the money was unlawfully obtained by the IRS. An examination on the merits is therefore needed for the Court to determine whether under the law and particular facts of the case the Government unlawfully obtained possession of the money in question. This Court has the power to order the return of any unlawfully held property under Rule 41 (e) F.R. Crim.P., and under general principles of equity.

BOTTA V. SCANLON, 288 F 2d 504, 506 (1961)

"Certainly there are other and different 'special and extraordinary' circumstances than a tax imposed under an inapplicable oleomargarine statute. Thus, the injunction of the Fifth Amendment relating to deprivation of property

without due process of law may well be intitled to priority consideration under appropriate circumstances . . ."

FUENTES V. SHEVIN, 407 U.S. 67,80 (1972)
"The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual, its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment, to minimize substantively unfair or mistaken deprivations of property."

LINDER V. U.S. 268 U.S. 5, 17
"Congress cannot, under the pretext of executing delegated power, pass laws for the accomplishment of objects not entrusted to the Federal Government. And we accept as established dictrine that any provision of

an act of Congress ostensibly enacted under the power granted by the Constitution, not naturally and reasonably adapted to the effective exercise of such power but solely to the achievement of something within power reserved to the States (or petitioner in this case) is invalid and cannot be enforced."

UNITED STATES v. KAHRIGER 345 U.S. 22 (1953)
(Justice Frankfurter, dissenting)

" . . . However, when oblique use is made of the taxing power as to matters which substantively are not within the powers delegated to Congress, the Court cannot shut its eyes to what is obviously, because designedly, an attempt to control conduct which the Constitution left to the responsibility of the States, merely because Congress wrapped the legislation in the verbal cellophane of a revenue measure.

Concededly the constitutional questions

presented by such legislation are difficult. On the one hand, courts should scrupulously abstain from hobbling congressional choice of policies, particularly when the vast reach to the taxing power is concerned. On the other hand, to allow what otherwise is excluded from congressional authority to be brought within it by casting legislation in the form of a revenue measure could, as so significantly expounded in Child Labor Tax Case, supra, offer an easy way for the legislative imagination to control 'any one of the great number of subjects of public interest' . . ."

". . . The motive of congressional legislation is not for our scrutiny, provided only that the ulterior purpose is not expressed in ways which negate what the revenue words on their face express and which do not seek enforcement of the formal revenue purpose through means that offend those standards of decency in our civilization against which due process is a barrier."

26 U.S.C. section 6402:

(a) General rule - In the case of any overpayment, the Secretary or his delegate, within the applicable period of limitations, may credit the amount of such overpayment, including any interest allowed thereon, against any liability in respect of an internal revenue tax on the part of the person who made the overpayment and shall refund any balance to such person.

Notes of Decisions

6. Discretion of Commissioner -

". . . Section 322 (I.R.C. 1939) providing that where there has been overpayment of tax, amount of overpayment shall be credited against income tax or installment thereof then due from taxpayer . . ."

10. Credits - Application of -

The overpayment of income taxes was properly credited against distilled spirits tax assessed against taxpayer, in absence of proof that such assessment was erroneous. Kjar v. U.S. 69 F.Supp.406,108 (1947)

26U.S.C. section 6512:

(a) Effect of Petition to Tax Court: If the Secretary or his delegate has mailed to the taxpayer a notice of deficiency under

section 6212(a) (relating to deficiencies of income tax . . .) and if the taxpayer files a petition with the Tax Court within the time prescribed in section 6213(a), no credit of refund on income tax for the same taxable year . . . in respect of which the Secretary of his delegate has determined the deficiency shall be allowed or made and no suit by the taxpayer for the recovery of any part of the tax shall be instituted in any court . . ."

26 U.S.C. section 7605:

(b) Restrictions on Examination of Taxpayer - "No taxpayer shall be subjected to unnecessary examination or investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary, after investigation, notifies the taxpayer in writing that an additional inspection is necessary."

ROWR form 471-B

DEPARTMENT OF THE TREASURY-INTERNAL REVENUE
NOTICE OF FEDERAL TAXES DUE

Chicago Title Co.
1001 S.W. 5th Ave., #120
Portland, OR 97204

Escrow Officer
Al Gloeckner

You are hereby notified that there is now due, owing, and unpaid from:

Joseph W. Smith, Jr.

To the United States of America, the sum of:

$2,566.54

For internal revenue taxes secured by a lien pursuant to sections 6321 and 6322, or the estate tax lien arising under section 6324, Internal Revenue Code, from the date of each assessment.

Kind of tax	Identifying Number	Date of Assessment
1040/12-31-73	454-36-4031N	04-09-79
1040/12-31-74	454-36-4031N	04-07-79

Unpaid Balance of Assessment	Interest	Total
$1,677.19	$104.10	$1,781.29
527.71	257.54	785.25

Additional interest will be charged after 10-29-80 at $.64 a day.

Additional late payment penalty of $N/A will be charged on and on the day of each month thereafter until

Dated at Portland, OR this 29th day of October 1980

A certificate of release of Federal tax lien will be filed immediately only if payment is by:

(1) Cash;
(2) Certified or cashier's check;
(3) Treasurer's check drawn on a national or state bank or trust company; or
(4) United States postal, bank, qualified building and loan association, express, or telegraph money order.

If payment is in some other form, such as personal check, the release will be delayed for 60 days, or until evidence is furnished that the funds have been transferred.

Caution to Fiduciaries: For personal liability for failure to honor priority of debts due the United States, see sections 3466 and 3467 of the revised statutes (31 U.S.C. 191, 192.)

Please make payment payable to Internal Revenue Service and send it to:

Internal Revenue Service
P.O. Box 4451
Portland, OR 97208

District Director of Internal Revenue
Ralph B. Short

By (signature)
BILL MANDERFELD
Revenue Officer

Telephone Number
(503) 221-3942

No. 80-1570

APR 14 1981

In the Supreme Court of the United States

OCTOBER TERM, 1980

JOSEPH W. SMITH, JR., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1980

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JOSEPH W. SMITH, JR., PETITIONER

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COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner seeks review of the decision below in this income tax case upholding a deficiency of $640.96 in 1974 and a negligence penalty of $61.91 for 1973 (Pet. App. 3, 4; R. 169, 170)[1] on the grounds that: (1) the income tax and the use of income tax proceeds for social welfare expenditures is confiscation of property in violation of the due process clause of the Fifth Amendment; and (2) the Internal Revenue Service and various of its employees conspired to defraud and harass him by, *inter alia*, crediting a 1975 refund against his 1973 and 1974 tax liabilities (Pet. 46-47), and making erroneous assessments.

The pertinent facts may be summarized as follows: In a joint return filed for 1973, petitioner and his wife claimed a

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[1] "R." refers to the original record on appeal as compiled by the Clerk of the Tax Court and filed in the court of appeals.

credit of $1,238, or 20% of their tax liability, as a "constitutional protest of the taxing and spending policies" of the government (R. 109-110). On audit, the Commissioner disallowed this credit (R. 89) and asserted a negligence penalty under Section 6653(a) of the Internal Revenue Code (26 U.S.C.) for taking a groundless credit (R. 153). Subsequently, the Commissioner allowed a net operating loss carryback from 1976 to 1973 in the amount of $1,695.40, resulting in an overpayment for 1973, which is now being held in petitioner's account pending the outcome of this case (R. 94).

In 1974, petitioner filed what purported to be a joint income tax return, but which his wife did not sign (R. 89-90). Petitioner's wife later filed a separate return (R. 90). The Internal Revenue Service originally treated petitioner's return as a joint return. This error was corrected and ultimately petitioner was treated as a married individual filing a separate return (R. 24, 90).

On his 1974 return, petitioner claimed a $200 deduction for "food stamp swindle" and a $429 credit against taxes as a protest of taxing and spending policies. He also reduced the reported gain on the sale of land by the "Joseph W. Smith, Jr. Way" (R. 90, 91, 92, 113-114), for asserted depreciation in the value of currency (R. 115). The Commissioner disallowed these claims and made numerous adjustments to reflect the splitting of income and deductions between the separate returns filed by petitioner and his wife[2] (R. 90-93). When petitioner challenged the Commissioner's action in the Tax Court, petitioner did not dispute the computation of the tax, but advanced constitutional objections to the income tax (R. 143-148).[3]

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[2]During 1974, petitioner and his wife were residents of Texas, a community property state (R. 113).

[3]While this case was pending in the Tax Court, petitioner brought suit in the United States District Court for the Southern District of Florida

ARGUMENT

1. There is no basis for petitioner's claim (Pet. 22-23) that the income tax is an unconstitutional confiscation of property without due process of law. Every court that has considered this argument has rejected it. See, *e.g.*, *Brushaber* v. *Union Pac. R.R.*, 240 U.S. 1, 24-25 (1916); *Swallow* v. *United States*, 325 F. 2d 97, 98 (10th Cir. 1963), cert. denied, 377 U.S. 951 (1964); *Acker* v. *Commissioner*, 258 F. 2d 568, 575 (6th Cir. 1958), aff'd on other issues, 361 U.S. 87 (1959); *United States* v. *Keig*, 334 F. 2d 823, 826 (7th Cir. 1964). See also *Wood* v. *Commissioner*, 462 F. 2d 691, 694 (5th Cir. 1972). It is likewise clear that petitioner's objections (Pet. 17) to the use of funds generated by the income tax for various social welfare purposes are "exclusively within the jurisdiction of the legislative and executive branches," rather than the courts. *Swallow* v. *United States*, *supra*, 325 F. 2d at 98.

2. Petitioner's charges of fraud (Pet. 7, 42, 45-47) and harassment (Pet. 41, 46) by the Internal Revenue Service are similarly without merit. The charges are based on an error made by the Service in determining petitioner's 1974 income tax liability. In computing the self-employment tax owed for 1974, the Service erroneously failed to take into account a loss reported by petitioner, resulting in an overassessment of $136.19 (R. 99). This error was regrettable, but as the court of appeals found (Pet. App. 33), it was corrected prior to trial and did not cause petitioner any injury.[4]

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for a refund of taxes paid for 1975. See *Smith* v. *Director of Internal Revenue*, 40 A.F.T.R. 2d 5553 (S.D. Fla. 1977). The Commissioner had credited petitioner's 1975 refund against the tax liabilities for 1973 and 1974 pursuant to Section 6402(a) of the Code. The district court dismissed petitioner's suit and petitioner did not appeal that action.

[4]Petitioner was also presented with an erroneous assessment of taxes due to his claim of a $429 credit against tax as a protest for government taxing and spending policies. This assessment was made under the

Petitioner's second claim of fraud (Pet. 11-12, 42) is based on the credit of a 1975 tax refund against his 1974 tax liability. But this issue is barred by *res judicata* (see Pet. App. 33-34), because petitioner made the same claim in the district court. *Smith* v. *Director of Internal Revenue*, 40 A.F.T.R. 2d 5553 (S.D. Fla. 1977). See note 3, *supra*. Petitioner took no appeal when the district court dismissed his suit for refund. Thus, since petitioner allowed that decision to become final, he cannot be heard to argue here (Pet. 49) that the district court erroneously dismissed his refund suit.

Petitioner also charges harassment by the Internal Revenue Service, through its "microscopic examination of his 1973 records" (Pet. 49), and "inappropriate meddling" (Pet. 53) by allowing his wife to file a separate return for 1974. It is, however, well settled that the Internal Revenue Service "can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." *United States* v. *Powell*, 379 U.S. 48, 57 (1964). Moreover, the agents' contacts with petitioner and his wife were nothing more than the investigation and audit of returns. See *Granger* v. *Marek*, 583 F. 2d 781, 784-785 (6th Cir. 1978). The audit of petitioner's wife's return was entirely proper because she was a party to the 1973 joint return and had possession of all the records (see Pet. App. 40). Furthermore, there is no evidence to support petitioner's contention (Pet. 51-53) that his wife was coerced into filing separately in 1974. Under Section 6013(a) of the Code, petitioner's wife was not required to file a joint return, and the evidence shows (Exh. 4-D) that she wished to dissociate herself from petitioner's tax protests.

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mathematical error provision, and would have denied the Tax Court jurisdiction over petitioner's constitutional claims (Section 6213(b)(1) of the Code. The government abated the assessment prior to trial (R. 99) in order to allow petitioner to argue the merits of his claim in the Tax Court.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

APRIL 1981

DOJ-1981-04